State Personnel Board, State of Colorado
Case Number 2001 B 026

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEROY BACHICHA,

Complainant,

v.

DEPARTMENT OF CORRECTIONS, BUENA VISTA CORRECTIONAL COMPLEX,

Respondent.

Hearing was commenced on October 24, 2000 and pretrial issues of discovery were addressed at that time. The matter reconvened on November 17, 2000, in part, to address issues regarding discovery. On January 19, 2001, the hearing was reconvened and lasted one day.

MATTER APPEALED

Complainant, Leroy Bachicha ("Complainant" or "Bachicha"), appeals his disciplinary termination by the Department of Corrections, Buena Vista Correctional Complex ("Respondent" or "BVCC").

For the reasons set forth below, the actions of Respondent are affirmed.

PRELIMINARY MATTERS

Respondent was represented by Coleman Connolly, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203. Respondent's advisory witness for the proceedings was Warden Tony D. Reid, BVCC, Buena Vista, Colorado.

At the time of commencement, Complainant was represented by Craig M. Cornish, Esq., Cornish & Dell'Olio, 431 North Cascade Avenue, Suite 1, Colorado Springs, CO 80903. Subsequently, Ian Kalmanowitz, Esq., Cornish & Dell'Olio, 431 North Cascade Avenue, Suite 1, Colorado Springs, CO 80903 provided representation.

1. Procedural History

Complainant filed a Notice of Appeal on August 28, 2000 in which he alleged his disciplinary termination was arbitrary, capricious, and contrary to rule or law. At the time of filing, Bachicha claimed that the evidence supporting termination was "not timely" and not consistent. A Receipt of Notice of Appeal was issued August 29, 2000 and hearing was set for October 12, 2000. The parties were advised by letter of the Board's mechanisms for facilitating settlement.

On September 20, 2000, Complainant filed a Motion to Modify Discovery, based in part, on late receipt of the Notice of Hearing and Labor Day. The parties subsequently requested to continue the hearing date. By way of order, a status conference was set for October 12, 2000 to address issues of discovery and pending motions. After another delay, the hearing was deemed to have commenced on October 24, 2001. A procedural order re: discovery and a revised Notice of Hearing was issued, and the matter was set to reconvene on November 17, 2000.

Complainant's prehearing statement and amended prehearing statements were filed November 3, 2000, November 14, 2000 and November 21, 2000 respectfully. Respondent's prehearing and amended prehearing statements were filed November 14, 2000. The parties indicated they attempted to settle the matter by filing a Notice of Compliance with Board Rule R-8-55, 4 CCR 801. Despite the filing of prehearing statements, the parties battled over discovery. A new procedural order was issued setting January 19, 2001 as the continued hearing date.

2. Protective Order

Upon the parties' joint motion, a protective order was issued concerning certain restrictive and security-sensitive materials in the possession of the Department of Corrections. The protective order was granted as to certain bate-stamped documents produced in discovery.

3. Witnesses

Respondent called the following witnesses in its case-in-chief:

Name	**Position and Location**
Treasure M. Davis	Officer BVCC
Don Mann	Captain BVCC
Tony D. Reid	Warden BVCC

During its rebuttal case, Respondent called Warden Reid.

Complainant called himself and Captain Mann to testify in his case-in-chief.

4. Exhibits

The following exhibits were stipulated into evidence by the parties at the commencement of the hearing.

Exhibit #	**Description**
1 & B	Letter of Termination 8/18/00
2	Transcript of R-6-10 meeting 8/15/00
A	Letter of Notice of R-6-10 meeting 8/9/00
C	Dept. of Corrections Subject to Protective Order by the ALJ
D	AR 1450-05-Unlawful Discrimination/Sexual Harassment Dept. of Corrections
E	EEOC Guideline on Sexual Harassment 29 CFR Ch XIV (7-1-99 Ed.)
F	Final Page of Performance Evaluation 4/10/00

ISSUES

Respondent characterizes the issues in this matter as: (1) whether the decision of the appointing authority to discipline Complainant was arbitrary, capricious, or otherwise contrary to rule or law; and (2) whether the discipline imposed was within the range of alternatives available to the appointing authority. Complainant cites the same issues and adds a third issue: whether there was appropriate/sufficient notice of the R-6-10 meeting.

FINDINGS OF FACT

I. Department of Corrections, BVCC

A. *Security at Facility*

1. Buena Vista Correctional Complex is part of the Department of Corrections. It houses approximately 1260 inmates at any given time. (Mann).

2. Within BVCC there are 4 levels of inmates, including those held in minimum security (i.e., boot camp), the segregation unit (i.e., maximum security), medium security, and other minimum restrictive areas. (Mann).

3. BVCC has employee housing on its property which allows employees and their families to reside on the facility. Family members are not to wander on the grounds unattended. (Bachicha).

4. The facility has at least two watch towers which enable security surveillance of BVCC. The towers contain telephones and radios. (Mann).

5. In addition, security is maintained through the use of a mobile security vehicle, referenced as Post 1208. This is a roving patrol vehicle which contains radio communications with the Control Center and the watch towers. (Mann, Bachicha).

6. The mobile post is responsible for a number of duties, including:

    - Monitoring inmates' movements within the facility;
    - Monitoring inmates' movements outside the facility when on work details;
    - Observing movements of individuals outside BVCC in order to prevent hiding of contraband, assistance of inmates in escapes or illegal activities;
    - Watching visitors to BVCC who may be attending events;
    - Interacting with tower officers;
    - Observing movements at the BVCC warehouse which is minimum security; and
    - Miscellaneous activities including raising/lowering the facility's flags.

7. The mobile post is a 24-hour post, which is manned through 3 shifts. If an officer needs to leave the post (i.e., leave the vehicle), he is required to communicate such need to a tower or the Control Center. (Mann).

8. BVCC utilizes shift commanders to monitor and supervise day-to-day security needs, inmate housing needs, and staff in the maintenance, vocational and industrial areas. (Mann).

9. BVCC has one post known as the Sally Port post. This post monitors the incoming and outgoing inmates who are assigned to work crews. Corrections officers at this post are responsible for verifying the identity of

individuals, etc. On occasion, only one corrections officer is at the post. (Complainant).

B. *Administrative Regulation RE: Sexual Harassment*

10. BVCC has Administrative Regulation 1450-05, effective 3/1/00, which addresses sexual harassment. It provides, in part, that BVCC's policy is to maintain a healthy work environment free of discrimination and sexual harassment. (Ex. D).

11. AR 1450-05 defines sexual harassment as any deliberate, unwanted or unwelcome behavior of a sexual *nature whether verbal, nonverbal, or physical.* (emphasis added). (Ex. D).

12. The regulation requires that complaining parties are to document incidents, maintain records, and are under an obligation to report their issues to an appropriate appointing authority. (Ex. D).

13. Staff who witness sexual harassment, as defined, are obligated to report it, whether or not they are the victim. (Ex. D).

14. Complaints of sexual harassment are to be investigated by the appointing authority or the Inspector General's office at DOC. (Ex. D).

15. Training is provided to employees on this administrative regulation during initial training at the training academy.

C. *Administrative Regulation RE: Use of Force*

16. BVCC has an administrative regulation addressing the issue of the use of force.[1] The use of force involving inmates is applied along a continuum based on circumstances. One technique with the use of force is the "Armed bar take-down." (Reid, Complainant, Ex. C).

17. In the event the administrative regulation becomes applicable, an incident report needs to be filed. (Ex. C).

18. Some previous violations of the use of force regulation have resulted in corrective action(s) to staff, including Sgt. Westbrook. In that incident, Westbrook was assisting another corrections officer and he completed all the necessary paperwork. (Reid).

[1] While both parties are aware of the contents of the administrative regulation, the contents of the regulation are under protective order. See Order dated December 20, 2000.

19. In the event of a use of force incident with an inmate, once an inmate is controlled, they are medically examined for injuries. (Reid).

20. As part of its Staff Code of Conduct, BVCC has an administrative regulation prohibiting horseplay between staff or staff and offenders. Horseplay is defined as including wrestling, pushing, chasing or practical jokes. (Ex. 1). The same AR states that staff shall not falsify or depart from the truth in the course of performing their duties. (Ex. 1).

21. While attending the training academy, attendees receive instruction on administrative regulations regarding sexual harassment, use of force, and standards of conduct. (Reid).

22. On October 1, 2000, Tony Reid was warden of BVCC. He has been with DOC for approximately 26 years. Immediately prior to becoming warden, he was an associate warden at BVCC and was active in the management of the facility while the previous warden was unavailable. (Reid).

II. Background of Complainant

23. Complainant was raised in Pueblo, Colorado and has an Associates Degree in Criminal Justice.

24. Complainant began his employment with DOC in January 1999. After attending the training academy, Complainant was assigned to BVCC. Complainant was a Corrections Officer I. (Complainant, Reid).

25. In addition to being a CO I, Complainant was a member of the special response team. The elite team is responsible to take "whatever action is necessary" to protect the public in the event of an emergency. (Complainant).

26. Complainant received an overall rating of Competent on April 10, 2000. (Ex. F).

27. While at BVCC, Complainant had a variety of assignments including working the Sally Port position and Post 1208.

III. Sally Port and Use of Force

28. On or about May 20, 2000, Complainant was involved in an altercation with an inmate while working the Sally Port post. (Complainant, Ex. 1, Ex. 2).

29. An inmate tapped Complainant on shoulder at which time Complainant advised the inmate to not provoke any incidents or he would be restrained.

30. The inmate threatened to continue tapping Complainant. As a result, Complainant used an Arm-bar take down to restrain him. (Complainant, Ex. 2).

31. During the application of the use of force, Lt. Morris entered Sally Port and observed the behavior. He raised his voice at Complainant, advising him to cease his take-down. (Complainant, Ex. 2).

32. While yelling at Complainant, Lt. Morris indicated he would "take care" of the situation. (Complainant, Ex. 2). It was not made clear whether this would be considered a act of horseplay or use of force.

33. Sometime thereafter, Complainant advised Captain Thomas, a member of BVCC's command structure, of the incident and claimed it was not horseplay. Other information was received by BVCC command, including a report from Lt. Morris, suggesting that the incident was horseplay. (Complainant, Reid).

34. No incident report was filed by Complainant or Captain Thomas.

35. A fact finding committee was formed, led by Major Dunbar. The committee determined that there were conflicting stories and recommended that an R-6-10 meeting be convened.

IV. Interactions with Treasure Davis

37. Treasure Davis joined BVCC in March 2000 as a State Services Trainee IV. Her duties are clerical in nature and include assigning inmates to bunks, processing parole paperwork, and fulfilling the administrative needs of the on-duty captain and majors. (Davis). The position is not that of a peace officer or a corrections officer. However, Davis did attend the training academy prior to beginning work at BVCC.

38. In performing her duties, Davis has access to secured and non-secured areas within BVCC. (Davis).

39. On June 5, 2000, Davis was leaving a secure area of the facility known as the trap. As she proceeded to her office, she passed through a unsecured corridor linked to the kitchen facility in which inmates worked. The serving of lunch was completed and Complainant was in the process of searching the "kitchen-working" inmates in the corridor prior to escorting them into a secured area. (Davis, Complainant).

40. As the inmates were being "patted down," Complainant made a comment to Davis suggesting that she should come over to the corrections officers so that she could be "patted down." There was no legitimate need to search or pat down Davis. (Davis, Complainant).

41. Davis suggested that she and Complainant go to the captain's office to discuss the comment. Once in the office area, Davis stated to Complainant that such a comment was not appreciated. He apologized at the time. (Complainant).

42. The discussion between the two parties was overheard by individuals in the office area. Days later, Davis' supervisor was asked to report to Captain Howell on the details of the incident. At that point, Davis was requested to write a report. (Davis).

43. Subsequent to the filing of the report, Complainant met with supervisors to discuss the incident and was ordered to write a report of the incident. He called Davis to determine what she had written in her report. (Davis, Complainant).

44. In writing his initial report and out of fear of losing his job, Complainant made a misrepresentation and stated that he had invited Davis to "come over and help" pat down the inmates. (Complainant).

45. The evening after filing the report, Complainant felt uncomfortable with his misrepresentation and notified Acting Captain Burnell of his actions. (Complainant). Complainant filed a corrected report the next day.

46. Reid became aware of the incidents and was concerned about issues involving sexual harassment. After checking with an investigator, Reid was advised to conduct an investigation himself.

47. Through memo, Reid directed the same panel investigating the Sally Port incident to investigate this matter. He then departed for vacation, and returned on or about July 19, 2000. (Reid).

48. Upon his return, Reid was made aware that rumors had been circulating that Complainant had abandoned his post on at least one occasion.

V. The R-6-10 Meeting and Post 1208

49. Notice of the R-6-10 meeting was sent certified mail on August 9, 2000. The notice was addressed to Complainant's listed address, a post office box.

50. The notice specified that an R-6-10 meeting was being convened on August 15, 2000 with regard to issues identified by the fact finding panel, including AR 1450-1 (Staff Code of Conduct) and AR 1450-5 (Unlawful Discrimination/Sexual Harassment). Reid was the delegated appointing authority for the matter. (Ex. A).

51. On August 15, 2000, an R-6-10 meeting was convened. Complainant stated that he did not receive the Notice of R-6-10 meeting. The return-receipt of the certified letter had not been returned to BVCC. Complainant had changed his address within a week of the meeting. Respondent, at the time, did verify that Complainant's address had changed within the last week. (Reid, Ex. 2).

52. Complainant did review the letter prior to the meeting and was advised that he could obtain a representative if he so desired. Bachicha said he did not want a representative at the meeting.

53. During the R-6-10, Complainant admitted to using force on an inmate. He maintained that no horseplay was involved. (Complainant, Ex. 2).

54. During the R-6-10 meeting, Complainant admitted he had initially lied about the incident with Treasure Davis and that he had corrected his misrepresentation. (Complainant, Ex. 2).

55. Complainant further admitted he left Post 1208 on one occasion to take his children to school. (Ex. 2). This was a result of having been asked to report to work earlier than usual. Complainant volunteered that when he left the mobile post, he picked up his own car, proceeded home, picked up his children, left BVCC property, and dropped the children off. He did not take his radio with him. (Ex. 2, Complainant).

56. Based on the admissions made during the R-6-10 meeting, and the findings of the committee, Respondent terminated Complainant for willful misconduct. It was BVCC's finding that the three incidents were serious and flagrant. (Ex. 1).

PARTIES' ARGUMENTS

Respondent argues that the admitted acts of Complainant are serious and flagrant enough to justify the imposition of discipline, presumably under Board Rule R-6-2, 4 CCR 801 (2000). BVCC cites to the fact that Complainant had made misrepresentations to BVCC while under an obligation to accurately report matters. It also believes that the abandonment of the 1208 post represents the seriousness of Complainant's acts . Further, it is Respondent's

argument that Complainant violated at least 2 administrative regulations in a brief period of time, demonstrating an inability to perform his duties.

Complainant argues that while he may have made admissions to certain bad acts, i.e., not accurately reporting the use of force or an incident involving sexual harassment, he did try and correct his errors. He did contact supervisory staff in both incidents and felt that the matters had been resolved at the lowest level possible. In addition, Complainant argues that with regard to abandoning his post, the duties at Post 1208 are such that his departure from the post to take his children to school, in the winter, was wrong but of little consequence. Complainant believes a number of mitigating circumstances exist because while some misrepresentations may have been made by him, he corrected any misperceptions or inaccuracies as quickly as possible. Complainant feels that the discipline imposed was arbitrary and capricious because it was not within the range of reasonable alternatives available to the appointing authority. Complainant relies on the fact that if the violations of BVCC protocols were so serious, action should have been taken immediately to remove Complainant from his position. This did not happen. In fact, the supervisory staff went on vacation subsequent to Complainant's actions without taking any measures to safeguard the facility or place Complainant on administrative leave.

DISCUSSION

I. Introduction

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 (1999) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

> Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge, Inc.,* 972 P.2d 707 (Colo. App. 1999). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

In *Bodaghi v. Department of Natural Resources*, 2000 WL 276913 (Colo. 2000), the Supreme Court of Colorado held:

> The findings of an administrative tribunal as to the facts shall be conclusive if supported by substantial evidence. See § 24-4-106, 7 C.R.S. (1999). Even when evidence is conflicting, the hearing officer's findings are binding on appeal, and a reviewing court may not substitute its judgment for that of the factfinder. See: *Glasmann v. Department of Revenue*, 719 P.2d 1096, 1097 (Colo.App.1986). An agency's factual determination reasonably supported by the record is entitled to deference. See: *Department of Revenue v. Woodmen of the World*, 919 P.2d 806, 817 (Colo.1996); *G & G Trucking Co. v. Public Utils. Comm'n*, 745 P.2d 211, 216 (Colo.1987).
>
> The credibility of witnesses and the weight to be accorded their testimony lies within the province of the agency as trier of the facts. See: *Goldy v. Henry*, 166 Colo. 401, 408, 443 P.2d 994, 997 (1968). Where the record supports the findings of the factfinder, the court of appeals is not at liberty to make an independent evaluation of the evidence and substitute its judgment for that of the factfinder. See: *Linley v. Hanson*, 173 Colo. 239, 242-43, 477 P.2d 453, 454 (1970). As stated *in Goldy v. Henry:*
>
> > [T]he credibility of witnesses as well as the weight of the testimony are peculiarly within the province of the commission to whom a

> statute entrusts the fact finding process. When a conflict in the evidence exists, it is not within the power of a reviewing court to substitute its judgment for that of the fact finding authority as to the weight of the evidence and the credibility of witnesses.

All of these factors were considered in evaluating witnesses' testimony. Additionally, all evidence introduced was considered.

There was not a great deal of material evidence introduced at hearing. A majority of evidence took the form of verbal testimony from the appointing authority and Complainant. As a result, credibility of the witnesses' testimony is critical in determining if BVCC's actions were arbitrary and capricious. Complainant's credibility is less than stellar given the testimony provided at hearing, and his previous actions and comments. For instance, by way of admission, Complainant admitted he misrepresented the comments made to Davis involving the "pat down." His story changed when he was held accountable for his actions. With regard to the use of force incident, Complainant at one point maintained he was alone in the Sally Port post, and later admitted other BVCC corrections officers were present. Complainant maintained he was relatively new to the position and came from a construction background. Yet, he did attend the training academy and was made aware of the administrative regulations at issue. In sum, by reviewing his testimony at hearing, and comments provided during the R-6-10 meeting, it is clear that there are inconsistencies in Complainant's testimony, that his motive of trying to say anything to preserve his job is clear; and that his testimony is subject to bias.

On the other hand, despite the little documentary evidence introduced by Respondent, it would appear that Reid, Davis, and Mann provided accurate testimony. No evidence was introduced to question their credibility. The information they provided comported with Complainant's admissions.

II. Notice of R-6-10 Meeting

A troubling aspect of this case are the events involving *notice* of the R-6-10 meeting. Board Rule R- 6-10, 4 CCR 801 states:

> When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appointing authority and employee are each allowed one representative of their choice. Statements during the meeting are not privileged.

Under the former Board rule regarding notice of hearing, the Court of Appeals held:

> Procedural due process **requires notice and an opportunity** to be heard. *People in Interest of D.G.*, 733 P.2d 1199 (Colo.1987). These principles apply to administrative proceedings. *Electric Power Research Institute, Inc. v. City & County of Denver*, 737 P.2d 822 (Colo.1987). However, the notice required in an administrative proceeding does not require the same formality, specificity, and detail that is required in a criminal proceeding. See generally *Chiappe v. State Personnel Board*, 622 P.2d 527, 532 (Colo.1981) ("Due process calls for the procedural protections which the particular situation demands."). (emphasis added).
>
> Department of Personnel Rule 8-3-3(D), 4 Code Colo. Reg. 801-1, requires an appointing authority to meet with an employee facing disciplinary action, to present the information to the employee, and to give the employee an opportunity to admit or refute the information. Due process requires that respondents comply with these standards. See *Department of Health v. Donahue*, 690 P.2d 243 (Colo.1984); *Shaball v. State Compensation Insurance Authority*, 799 P.2d 399 (Colo.App.1990).

Bourie v. Department of Higher Educ. 929 P.2d 18, 22 (Colo.App. 1996).

In *Shumate v. State Personnel Bd.*, 528 P.2d 404, 34 Colo.App. 393, (Colo.App. 1974) it was held that the pre-disciplinary 'meeting' must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself.

In this instance, there is an issue of fact as to whether notice of the R-6-10 meeting was appropriately served upon Complainant. Respondent did not send the notice to the correct address despite its records indicating a new address. A transcript of the R-6-10 meeting, however, suggests that Complainant waived any right to notice of the meeting by stating that he did not receive the letter, but was prepared to attend the meeting after having reviewed the letter. (Ex. 2). As cited in *Re Marriage of Robbins,* 2000 WL 991959 (Colo. App. 2000) at 3:

> Waiver is the intentional relinquishment of a known right. Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests an intent to relinquish the right or acts inconsistently with its assertion. To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Burlington Northern R.R. Co. v. Stone Container Corp.*, 934 P.2d 902 (Colo.App.1997).

Here, Complainant impliedly waived any right to receive written notice of the R-6-10 meeting because: (1) he did receive a copy of the notice at some point and

reviewed it before the meeting was continued; (2) he did not express any resistance to having the R-6-10 meeting continue; (3) he had notice of the issues to be discussed at the meeting as expressed in the letter; and (4) he continued to participate in the R-6-10 meeting after having reviewed the letter. In terms of procedural due process, Complainant was given an opportunity to be heard on identified issues and he participated in the meeting. He availed himself of the opportunity to defend himself in the meeting, and did so.

III. Acts for Which Discipline was Imposed

There is little or no dispute as to the facts in this case demonstrating that Complainant committed the acts for which discipline was imposed. The disciplinary letter outlined 3 primary causes for the need to impose discipline:

- Violation of the use of force administrative regulation and/or violation of the administrative regulation prohibiting horseplay;
- Inappropriate sexual comments; and
- Abandonment of a mandatory post.

Complainant does not dispute any of these acts. He admitted prior to hearing and at hearing that he used force in restraining an inmate and admitted that he failed to complete a report. Complainant admitted he made an inappropriate comment to Davis which could be construed as in violation of the administrative regulation on Unlawful Discrimination/Sexual Harassment.[2] Then, he lied about it. Then, he tried to correct the misrepresentation. And finally, Bachicha agrees that he did abandon his post in order to transport his children part way to school. He states he did not carry his radio with him. He did not inform the Control Center or the watch tower that he was leaving the mobile unit, and leaving BVCC grounds while on duty.

IV. Level of Discipline Imposed

Board rules require that when considering discipline, a number of factors need to be taken into account:

> The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

[2] Complainant argues that the admitted comment made was a single incident, not creating a sexually hostile work environment. (Ex. F).

See: R-6-6, 4 CCR 801 (1998). Board Rule R-6-2 provides that corrective action is to be taken first unless the acts are so serious or flagrant as to warrant discipline.

The Board has consistently held that acts which compromise security, safety, and transportation, are matters that are serious and flagrant. As a result, the Board has consistently held that pursuant to Rule R-6-2, discipline can be imposed without prior corrective action. See: *Brian Gonzalez v. Dept. of Corrections, Youthful Offender System*, State Personnel Board Case No. 2000B034; *Denise Marie Ortiz v. Dept. of Corrections*, State Personnel Board Case No. 2000B140. In this instance, the appointing authority could impose discipline because the security of BVCC was compromised by Complainant abandoning his post. Safety and security were also put at risk with Complainant's actions of using force and failing to report such use or insuring that the inmate was medically examined.

In imposing termination as the form of discipline, Respondent met its burden of proof and showed by a preponderance of evidence that it did not act arbitrarily, capriciously, or contrary to rule or law. While termination is an extreme form of discipline, it is sometimes warranted. In this case, the appointing authority considered the nature, extent and seriousness of the acts. This is first demonstrated by the fact that he convened a fact-finding panel to investigate matters. The fact-finding body provided an independent and supposedly unbiased review of the allegations against Complainant . In addition, Complainant made numerous admissions as to his conduct. Especially with regard to abandoning his post, it is clear that this was an extreme and serious act. The use of force or even horseplay, can also be treated as serious as it compromises the relationships between inmates and staff, puts both at risk, and creates potential liability for the facility.

Complainant maintains that if the acts committed were "so serious," Complainant should have been placed on administrative leave immediately, after the fact finding panel, in order to safeguard the facility. He contends it is incongruous for the appointing authority to state the acts committed were serious yet fail to act immediately so as to "protect" the facility. If the appointing authority was so concerned about Complainant's actions, the safety of inmates, and security at the facility, it would seem reasonable to place Complainant on some type of leave. That was not done. Rather, the appointing authority went on vacation, leaving no instructions on this issue in his absence. On the other hand, it can be argued that the appointing authority took very measured steps before imposing discipline. He allowed a fact finding panel to convene and he made sure time was provided to collect information. Given the Board's position in related matters, just because the appointing authority did not place Complainant on administrative leave immediately does not mean the matter was not serious. It more likely reflects measured thinking in determining what actions to take.

What is disappointing about the level of discipline imposed is that Complainant attempted to correct two out of the three acts committed. He apologized immediately to Davis and recognized his comment was inappropriate. In the subsequent investigation, he corrected his initial misrepresentations almost immediately by notifying BVCC's command and filing an updated incident report. With regard to the use of force incident, he accepted a superior's word that things would be "taken care of." Complainant's desire to correct some of his actions demonstrates some measure of mitigation. However, the appointing authority believed the acts committed better demonstrate that Complainant failed to: (1) exercise good judgment; (2) engaged in willful misconduct by failing to follow BVCC's regulations, and (3) willfully failed to perform his duties.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.
2. The disciplinary termination was within the range of reasonable alternatives available to the appointing authority given the nature and seriousness of the acts, and BVCC's responsibilities.
3. Complainant waived any arguments regarding insufficient notice of the R-6-10 meeting by knowingly and actively participating in the meeting.

ORDER

Respondent's actions are upheld and the decision of the appointing authority is affirmed.

Dated this 5th day of March, 2000

G. Charles Robertson
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of March, 2001, I placed true copies of the foregoing Initial Decision of the Administrative Law Judge and Notice of Appeal Rights in the United States mail, postage prepaid, addressed as follows:

Ian Kalmonowitz, Esq.
Craig M. Cornish, Esq.
Cornish & Dell'Olio
421 North Cascade Ave. ,Suite 1
Colorado Springs, CO 80903

AND IN THE INTERAGENCY MAIL TO:

Coleman Connolly
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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